

Order

Michigan Supreme Court
Lansing, Michigan

March 18, 2022

Bridget M. McCormack,
Chief Justice

161324

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161324
COA: 348831
Allegan CC: 18-021494-FC

DEREK JEFFREY MESHKIN,
Defendant-Appellant.

On January 13, 2022, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the Court of Appeals opinion and REMAND this case to the Allegan Circuit Court for a new trial.

When a witness testifies to the good character of the defendant in a criminal case, MRE 405(a) permits cross-examination of the witness about specific instances of conduct that might call into question the defendant's reputation for honesty and integrity. The purpose of this cross-examination is to test the credibility of the character witness and help the fact-finder determine what weight to give the witness's testimony. *People v Dorrikas*, 354 Mich 303, 316-317 (1958). Though trial courts have wide discretion in evaluating such inquiries, "[w]ide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." *Id.* at 318, quoting *Michelson v United States*, 335 US 469, 480 (1948). We have been clear about the trial court's responsibilities in this regard, saying these inquiries should not be made without:

- (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and
- (2) the trial judge making a careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted. [*Id.* at 326.]

These steps must be followed to ensure counsel is not "taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box." *Id.* at 321, quoting *Michelson*, 335 US at 481.

Defendant presented a character witness at trial, and on cross-examination, the prosecutor asked this witness if it was true that defendant had committed a previous sexual assault. The trial court did not determine whether there was any factual basis to support the question, the prosecution did not offer any, and the trial court did not instruct the jury as to the reasons why such a question was permissible. Inquiries of this type, without any basis in fact and without any of the necessary protections afforded by the trial court, are improper. *Dorrikas*, 354 Mich at 317-318, 326-327; *People v Whitfield*, 425 Mich 116, 131-133 (1986). The trial court erred by allowing a “‘groundless question to waft an unwarranted innuendo into the jury box.’” *Dorrikas*, 354 Mich at 321, quoting *Michelson*, 335 US at 481.

Defendant tried to offer testimony to show the falsity of the suggestion inherent in the prosecution’s question, but the trial court excluded the testimony. Defendant argues that this denied him his constitutional right to a fair trial. We agree. Given that this case “essentially boiled down to whether the complainant’s allegations” were true, *People v Armstrong*, 490 Mich 281, 293 (2011), this error was not harmless beyond a reasonable doubt, *People v Anderson*, 446 Mich 392, 404-406 (1994).

Defendant also argues that he was denied his constitutional right to present a defense because the trial court excluded his proposed expert from testifying that the complainant suffered from Reactive Attachment Disorder (RAD). While we need not reach this question in light of our holding that defendant is entitled to a new trial on the basis of the prosecution’s improper cross-examination, we address the admissibility of this expert testimony because it is likely to arise on retrial. In excluding the evidence, the trial court reasoned, “I think the prejudicial nature of the evidence would be to mislead the jury to believe that everyone that has RAD lies about everything they say.” But defendant’s offer of proof states that his expert would confine his testimony to “the relevant facts of the Reactive Attachment Disorder diagnosis” and refrain from any “evaluative statements regarding the veracity of [the complainant’s allegations], the accuracy of diagnoses, or any other facet related to the facts of this case.” And the prosecution has conceded that this evidence is not categorically inadmissible.

Expert testimony related to a complainant’s background is often admissible, so long as the expert does not opine on whether the complainant is being truthful. *People v Peterson*, 450 Mich 349, 373-375 (1995). While RAD may present a trial court with a more difficult challenge than other types of expert testimony, other jurisdictions appear to navigate this complexity. See *Large v State*, 177 P3d 807, 817-818 (Wy, 2008); *Darst v State*, 323 Ga App 614, 622-623 (2013); *State v Weisbarth*, 384 Mont 424, 425-429 (2016); *State v Salsbery*, 4 Wash App 2d 1023 (2018). On retrial, if the parties seek to

admit expert testimony, the trial court can conduct a *Daubert* hearing to ensure that the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993); *People v Tomasik*, 498 Mich 953 (2015). The scope of the expert's testimony, if admissible, could also be determined by the court in advance to address the potential prejudice from any specific testimony.

We do not retain jurisdiction.



t0315

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 18, 2022

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk